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No. 91-1679

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ILLINOIS COUNCIL ON LONG TERM CARE; GILMAN NURSING CENTER, an Illinois limited partnership; SPRING VALLEY NURSING CENTER, an Illinois limited partnership; and WOODSIDE MANOR, an Illinois corporation,

Petitioners,

v.

PHILIP C. BRADLEY, in his official capacity as Director of the Illinois Department of Public Aid; DAWN CLARK NETSCH, in her official capacity as Comptroller of the State of Illinois; and PATRICK QUINN, in his official capacity as Treasurer of the State of Illinois,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Seventh Circuit, in affirming the district court's decision to deny Plaintiffs' motion for a preliminary injunction and to remand with instructions to dismiss the case on the merits, erred as a matter of law in holding that Plaintiffs failed to establish any chance of prevailing on the merits of their claim that the Illinois State Medicaid Plan, which has been approved by the Secretary of the United States Department of Health and Human Services, violates the Medicaid Act, 42 U.S.C. §1396 *et seq.*, by assuring that providers of nursing home services to Medicaid beneficiaries will be paid for those services within twelve months of receipt of claims for payment by the Illinois Department of Public Aid.

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STATEMENT OF THE CASE

I. NATURE OF THE CASE

On November 28, 1979, the Secretary of the United States Department of Health and Human Services ("Secretary") approved a State Medicaid Plan amendment submitted by the Illinois Department of Public Aid ("IDPA") regarding timely payment of Medicaid provider claims.

This State Medicaid Plan amendment assures that IDPA meets all requirements of 42 C.F.R. §447.45 for timely payment of claims.

The approval of this State Medicaid Plan amendment demonstrates that the Secretary made an evaluation that the amendment comported with the Medicaid Act. There is no other portion of the State Medicaid Plan that addresses the issue of timeliness of payment.

Recently, nursing homes in Illinois were usually paid for Medicaid services between thirty and forty-five days after the Department received claims for payment, although this period was extended as the end of a fiscal year approached. In early fiscal year 1991 (July, 1990), payments to nursing homes were made, on the average, within forty days after the Department received claims for payment. As of late March 1991, payments to nursing homes were being made, on the average, more than eighty days after the Department received claims for payment.

Petitioners, a not-for-profit professional health care association and three of its member nursing homes, allege that respondents, the Director of IDPA, the Comptroller of the State of Illinois, and the Treasurer of the State of Illinois, are violating various provisions of the Medicaid Act, 42 U.S.C. §1396 *et seq.*, by failing to pay nursing homes for services provided to eligible Medicaid beneficiaries within forty-five days after claims for payment are submitted to the Department.

II. COURSE OF PROCEEDINGS IN THE DISTRICT COURT

Petitioners filed a complaint against the Director of IDPA, Philip C. Bradley, on March 19, 1991. Petitioners alleged that Director Bradley has violated certain provisions of Title XIX of the Social Security Act, 42 U.S.C.

§1396 *et seq.* ("Medicaid"), and certain of its implementing regulations. Petitioners sought a declaration that failure to make monthly payments to nursing homes violates the Medicaid Act and an injunction requiring payment of nursing home claims for reimbursement within thirty days of the submission of such claims.

Petitioners also filed a motion for issuance of a temporary restraining order on March 19, 1991. The district court granted petitioners' motion on March 20 and set a hearing on the request for a preliminary injunction, first for March 29, then March 28, 1991. The parties proceeded with expedited discovery.

On March 25, 1991, petitioners filed their first amended complaint, which added the Comptroller, Dawn Clark Netsch, and the Treasurer, Patrick Quinn, of the State of Illinois as defendants. On March 26, 1991, Director Bradley filed a motion to dissolve the temporary restraining order and a memorandum in support of the motion and in opposition to entry of a preliminary injunction. Petitioners filed their motion for a preliminary injunction, with supporting memorandum, and a motion for rule to show cause on March 27, 1991. On March 28, 1991, the district court held an evidentiary hearing on petitioners' motion for a preliminary injunction.

On March 29, 1991, the district court issued its memorandum opinion and order, which granted Director Bradley's motion to dissolve the temporary restraining order and denied petitioners' motion for rule to show cause and motion for preliminary injunction. The district court was not persuaded by the petitioners' attempts to equate delayed payment with reduced payment. The district court reasoned that since the Secretary had made a finding that "a delay in payments of up to twelve months" did not contravene the Medicaid Act, then a "payment slowdown"

did not constitute an amendment (or change) to the State Plan, nor was it inconsistent with the "federal requirements with which the Plan has been found to comply." 759 F. Supp. at 1312-13. On this basis, the district court found that petitioners did not have a better than negligible likelihood of success on the merits of their claim.

III. COURSE OF PROCEEDINGS IN THE APPELLATE COURT

On March 29, 1991, petitioners filed their notice of appeal with the district court. On April 1, 1991, petitioners filed a motion for expedited appeal with the Court of Appeals for the Seventh Circuit. That motion was subsequently denied on April 9, 1991. Oral argument was heard on June 14, 1991.

On February 18, 1992, the court of appeals affirmed the decision of the district court and remanded the matter with instructions to dismiss the case on the merits. The court of appeals held that Illinois had not violated the Boren Amendment to the Medicaid Act by delaying payments to nursing home Medicaid providers. 957 F.2d at 310. The court of appeals found that the only time limit imposed on Illinois by the Medicaid Act and its implementing regulations for the payment of petitioners' claims is the twelve month rule set out in 42 C.F.R. §447.45(d)(4), which Illinois has not violated. *Id.* The panel agreed with the district court that the delay in payments did not constitute a change in the State Plan requiring approval of the Secretary. *Id.* at 309. For these reasons, the panel found that petitioners had not demonstrated any chance of success on the merits of their claim and ordered the district court to dismiss the case on the merits.

On March 6, 1992, petitioners filed a motion to stay the mandate pending the filing of their petition for writ of certiorari, which motion was granted.

SUMMARY OF ARGUMENT

The court of appeals found that the Boren Amendment to the Medicaid Act does not set time limits on the states requiring them to make Medicaid payments to nursing home providers any time sooner than what is already required by federal regulation. The court reasoned that the intention of Congress in enacting the Boren Amendment was to focus on the amount of a state's payments to Medicaid providers, not the time those payments are made to them. After reviewing the Boren Amendment's language and the context of the statutory and regulatory scheme in which it appears, the court of appeals concluded that the amendment does not require states to make payment to nursing home providers within any timeframes. The court of appeals found that the State's delay in making Medicaid payments to providers did not constitute a change in the State Medicaid Plan requiring approval of the Secretary of Health and Human Services because the payments were being made well within the time limit required by federal regulation.

The decision of the court of appeals is in accord with this Court's holdings that if Congress intends to impose a condition on the grant of federal moneys to the states, it must do so unambiguously. Since petitioners failed to cite any authority which would require the State to make Medicaid payments to them sooner than what is currently required by federal law, the court of appeals determined that the petitioners had no chance of success on the merits of their claim and properly ordered the district court to dismiss the case.

REASONS FOR DENYING CERTIORARI

I.

THE COURT OF APPEALS CORRECTLY DETERMINED THAT PETITIONERS FAILED TO DEMONSTRATE ANY CHANCE OF SUCCESS ON THE MERITS BECAUSE THE MEDICAID ACT REQUIRES ILLINOIS TO PAY PETITIONERS' CLAIMS WITHIN TWELVE MONTHS OF RECEIPT AND NOT ANY SOONER.

Title XIX of the Social Security Act, 42 U.S.C. §1396 *et seq.*, commonly known as the Medicaid Program, provides federal grants to states for medical assistance to low-income persons. As this Court has recognized, the Medicaid Program is based on a system of "cooperative federalism". *Harris v. McRae*, 448 U.S. 297, 308 (1980). States that choose to participate in the program are entitled to substantial reimbursement from the federal government if they meet the requirements of Title XIX and its implementing regulations. *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, ____, 110 S.Ct. 2510, 2513 (1990). Each participating state is required to submit its Medicaid Plan to the Secretary of the United States Department of Health and Human Services ("Secretary") for approval. 42 U.S.C. §1396.

The federal statute governing the time in which a state must make a payment to a nursing home for services provided to a Medicaid beneficiary is silent as to a precise time limitation. 42 U.S.C. §1396a(a)(37). The implementing federal regulation, however, is specifie. This regulation, duly promulgated by the Secretary, provides that:

> (d) *Timely processing of claims.*
>
> . . . .
>
> (2) The agency [the Department] must pay 90 percent of all clean claims from practitioners [*e.g.* physi-

> cians], who are in individual or group practice or who practice in shared health facilities, within 30 days of the date of receipt.
>
> (3) The agency must pay 99 percent of all clean claims from practitioners, who are in individual or group practice or who practice in shared health facilities, within 90 days of the date of receipt.
>
> (4) The agency must pay *all other claims within 12 months* of the date of receipt. . . .

42 C.F.R. §447.45(d) (emphasis added).

Illinois' Medicaid Plan, approved by the Secretary, assures that "[t]he Medicaid agency meets all requirements of 42 CFR 447.45 for timely payment of claims." This assurance has been in effect since August 23, 1979. As it relates to this case, it is an assurance that nursing homes will be paid "within 12 months of the date of receipt" of a claim. 42 C.F.R. §447.45(d)(4). Petitioners make no allegation that respondents have violated this portion of the State Medicaid Plan. In addition, the Secretary has never found IDPA out of compliance with this provision of the State Medicaid Plan.

The other regulations on which petitioners rely, 42 C.F.R. §447.252 and 42 C.F.R. §447.253(a) and (b), do not relate to the timing of payment. Those provisions govern assurances relating to establishment of methods and standards used by IDPA to set payment rates. It is clear that underlying the rate methodology is the federal requirement that any nursing home payment made within twelve months of a claim's submission complies with federal law. Respondent Bradley processes claims from nursing homes for services provided to Medicaid recipients so that respondent Netsch can issue warrants in payment of the claims within twelve months of respondent Bradley's receipt of the claims.

Section 447.45(d)(4) permits Director Bradley to provide Medicaid payments to nursing homes at any time within the year following the receipt of bills for Medicaid services. The preamble to this regulation at the time of its adoption also makes its applicability clear.

> In the final rule, the timely claims requirements still apply only to individual, rather than institutional providers. This is exactly the requirement imposed by the statute. . . . Delayed payments are often more burdensome to individual practitioners than to institutional providers. We therefore have not changed the applicability of these regulations. We have, however, revised the 24-month time period for payment of claims from other than individual practitioners to 12 months.

44 Fed. Reg. 30,342 (1979).

Petitioners' argument is premised on the assumption that the Medicaid Act requires payment of nursing home claims for reimbursement within forty-five days of receipt. This flies in the face of the clear language of the pertinent federal regulation, 42 C.F.R. §447.45(d)(4), and two federal decisions that have interpreted the timeliness of payments made to providers under the Medicaid Act, *Chicago Osteopathic Medical Centers v. Duffy*, No. 88 C 1174, Medicare & Medicaid Guide (CCH), ¶38,395 (N.D. Ill. Oct. 27, 1989), and *United Cerebral Palsy Associations v. Cuomo*, 783 F. Supp. 43 (N.D.N.Y. 1992).

In *Chicago Osteopathic Medical Centers*, the district court recognized that the Medicaid Act does not set forth a specific timeframe in which to pay institutional providers for Medicaid services rendered, but that 42 C.F.R. §447.45(d)(4) provides that the State has twelve months to pay such claims. The district court in *Chicago Osteopathic Medical Centers* properly rejected the plaintiffs' argument that a delayed payment equals an allegedly re-

duced payment, which equals an allegedly lower rate, which equals an alleged violation of 42 U.S.C. §1396a(a)(13)(A). The court held that:

> [t]he court sees no reason to read . . . section 1396a (a)(13)(A) as rewriting 42 C.F.R. 447.45(d)—i.e., as limiting the power of states to take as long as 12 months to make payment where such a wait would prevent providers from operating on a cost-effective basis. On the contrary, the Secretary has already determined how the state and Medicaid providers shall share the risk of non-timely payment, with the providers responsible for financing the first 12 months and the state responsible for any delays thereafter.

The recent decision in *United Cerebral Palsy Associations v. Cuomo* held that the State of New York's delayed Medicaid payment to a provider "is not a 'reduction' in payment; nor is it a 'limitation'." 783 F. Supp. at 51. The court found that the plaintiffs had failed to demonstrate a likelihood of success on the merits with respect to their Boren Amendment claim. *Id.* at 50. This is in accord with the decision below in this case. *See also Illinois Council on Long Term Care v. Miller*, 579 F. Supp. 1140, 1149-50 (N.D. Ill. 1983) (motion for preliminary injunction to prevent delay in increased reimbursement denied).

The State has one year in which to pay a claim for reimbursement submitted by a nursing home. Nothing could be clearer. Petitioners cite no cases to the contrary. Instead, petitioners refer this Court to a litany of cases in which an actual rate change occurred that attempted to reduce the State's fiscal obligation to institutional Medicaid providers. No such alteration of the State's fiscal obligation to nursing homes has occurred here. The nursing homes' rates remain unchanged and the State remains obligated to pay those rates. Also unchanged is the

timeframe in which federal law permits payment of the nursing homes' full unchanged rate—one year. 42 C.F.R. §447.45(d)(4).

The other cases cited by petitioners involved rate freezes without adequate assurances being made to the Secretary. None of the cases cited by petitioners involved the issue here regarding the time in which a payment is made.

The appellate panel correctly found that the Boren Amendment to the Medicaid Act, 42 U.S.C. §1396a(a)(13)(A), does not impose time limits on the states for paying Medicaid claims. 957 F.2d 308. Petitioners, however, argue to the contrary. They contend that past practices and provider expectations should be read into the Boren Amendment and require new federal time limits. They argue that in fiscal 1991 "funding of the Medicaid payments to be made for long term care by the IDPA was based on 365 days, with payments to be made each month, that is twelve times during fiscal 1991, as in the past." Petition at 12.

Petitioners' argument that the issuance of warrants for payment of nursing home services must be done monthly is sophistry. Their conclusion that payments must therefore be made every month does not inevitably follow from their premise. Since appropriations are made annually, total payments are projected for a yearly period, and federal law requires that a payment be made within twelve months following receipt of a claim for payment, the operative timeframe is "365 days, or twelve months" or *one year*, not one month.[1]

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[1] Petitioners would like to be paid by IDPA within thirty days of submitting a bill. Federal law simply does not require payment that quickly. However, petitioners do have an adequate legal remedy in the Illinois Court of Claims. They may challenge the

(Footnote continued on following page)

Perhaps the district court best addressed petitioners' concerns regarding monthly payments.

> Plaintiffs' allegations of a slowdown simply constitute a change in practice by IDPA. A new practice, even one that imposes great hardships on Medicaid providers, that does not violate the provisions of the State Plan cannot, by itself, cause the Plan to contravene the federal requirements with which the Plan has been found to comply.

759 F. Supp. at 1312.

The court of appeals correctly determined that petitioners have no chance of prevailing on the merits of their claim. Federal law and the Illinois federally-approved State Medicaid Plan permit the State to pay nursing home claims within one year of their receipt. Both the appellate panel's decision and the district court's denial of a preliminary injunction was based solely on the applicable law. It is not inappropriate for a court to consider the case on the merits when the denial of a preliminary injunction is based solely on the law. *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 757 (1986). Since petitioners have no hope of prevailing on the merits, it was appropriate for the court of appeals to order the district court to dismiss the case on the merits. *Cf. Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (dis-

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[1] *continued*
adequacy of the payments, both principal and interest, in that court in accordance with their rights under state law. State law provides that medical vendors, such as nursing homes, seeking to enforce payment obligations of IDPA for services provided to medical assistance recipients must bring an action in the state's Court of Claims. Ill. Rev. Stat. ch. 23, §11-13. The Court of Claims shall award interest for bills that are not paid timely. Ill. Rev. Stat. ch. 127, §§132.403, -.403-1.

missal for failure to state a claim appropriate when it is "beyond doubt" that claim is not meritorious); *Centurion Reinsurance Co., Ltd. v. Singer*, 810 F.2d 140, 146 (7th Cir. 1987) (movant for preliminary injunction had "no hope" of prevailing on the merits).

II.

THE DECISION OF THE COURT OF APPEALS COMPORTS WITH CONGRESSIONAL INTENT AND SETTLED PRINCIPLES OF STATUTORY INTERPRETATION.

In deciding that the Boren Amendment to the Medicaid Act does not impose time limits on the states, the appellate panel reviewed "the amendment's language and the context of the statutory and regulatory scheme in which it appears . . ." 957 F.2d at 308. This fully complies with this Court's recent decision involving statutory interpretation in *King v. St. Vincent's Hospital*, ___ U.S. ___, 112 S.Ct. 570, 574 (1991). Specifically, the appellate panel concluded that Congress is well aware that states have one year to pay claims of nursing homes in the Medicaid Program. "At the time Congress passed the Boren Amendment, both the Medicaid Act and its implementing regulations expressly addressed the time in which states must pay claims." *Id.* Moreover, in the legislative history of a recent amendment to the waiver authority of the Secretary, Congress summarized the current law regarding timely payments to Medicaid providers by stating that "Medicaid law includes requirements that States pay health care practitioners, such as physicians, on a timely basis, but makes no such provision for other types of providers, such as hospitals." H. Conf. Rep. No. 964, 101st Cong., 2d Sess. 882, *reprinted in* 1990 U.S. Code Cong. & Ad. News 2374, 2587.

As further evidence of Congressional intent, the appellate panel reviewed 42 U.S.C. §1396(a)(37)(A) and concluded

that when "Congress wanted to impose time limits for payment of certain Medicaid claims, it did so explicitly." *Id.* Therefore, the inevitable conclusion that must be drawn is that Congress did not intend to impose time limits on the states for the payment of nursing home provider Medicaid claims through the Boren Amendment. If Congress had intended to impose time limits it would have done so explicitly, as is so amply demonstrated by 42 U.S.C. §1396(a)(37)(A).

The Boren Amendment was passed by Congress "to free states from reimbursement according to Medicare 'reasonable cost' principles as had been required by prior regulation." *Wilder v. Virginia Hospital Ass'n*, 496 U.S. 498, ____, 110 S.Ct. 2510, 2520 (1990). Petitioners' interpretation of the Boren Amendment stretches the intent of Congress beyond the limits of what the amendment was fashioned to cover. Congress intended the Boren Amendment to focus on the amount of a state's payments to nursing home Medicaid providers, not the time those payments are made to them.

The Medicaid Act is a statute enacted pursuant to Congress' power under the Spending Clause to place conditions on the grant of federal funds. *See Harris v. McRae*, 448 U.S. 297 (1980). As this Court has so often held, in dealing with a statute enacted pursuant to Congress' spending power, which provides for the disbursement of federal funds to states which agree to comply with federally-imposed conditions, it is important that Congress make its intent clear, since the legitimacy of Congress' attempt to legislate in this manner "rests on whether the State voluntarily and knowingly accepts the terms of the 'contract'." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17 (1981) (citations omitted). "Accordingly, if Congress intends to impose a condition on the grant of federal

moneys, it must do so unambiguously." *Id. See also Suter v. Artist M.*, ____ U.S. ____, 112 S.Ct. 1360, 1366 (1992).

In this case, Congress has not expressly set time limits on the states requiring them to make Medicaid payments to nursing homes any time sooner than within twelve months of receipt of a claim. Petitioners would have this Court judicially graft a different timeframe onto the Boren Amendment to be imposed upon the State. The State has neither received notice of, nor agreed to, such a timeframe. This result would be entirely inconsistent with the previous decisions of this Court.

Respondents are complying with the Medicaid Act and the approved State Medicaid Plan. Any injunction imposing requirements beyond those of Title XIX and the approved State Medicaid Plan would run afoul of clearly established law.

CONCLUSION

For all the foregoing reasons, respondents respectfully urge this Court to deny this petition for certiorari.

Respectfully submitted,

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